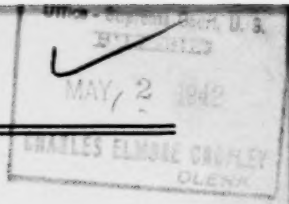

IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

316 US # 15

No. 1207 JAN-LAN

JAMAICA WATER SUPPLY COMPANY,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF.

HUGH SATTERLEE,
WM. R. GREEN, JR.,
Counsel for Petitioner

SUPREME PRINTING COMPANY, LAW PRINTERS, BARCLAY 7-0349

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

TO THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner, the Jamaica Water Supply Company, respectfully prays that a Writ of Certiorari be issued to review the judgment of the United States Circuit Court of Appeals for the Second Circuit entered February 18, 1942, affirming the decision of the United States Board of Tax Appeals in the above case.

The Question Presented.

This is an income tax case. Stated in its simplest terms, the question is whether the petitioner should include in its gross income for its fiscal year ending June 30, 1934, $575,000 earned during the years 1923 to 1928, inclusive, but not collected until July, 1934.

Summary Statement.

The petitioner is a public utility furnishing water to the City of New York. (R. 32) Prior to July 1, 1913, its compensation was fixed by contract with the City at $18.00 per hydrant per annum. On that date the contract expired and thereafter the petitioner continued to supply water at the same rate until April 29, 1919, on which date it notified the City that from January 1, 1919, it would charge the City at the rate of $45.00 per hydrant. Beginning June 30, 1919, it regularly billed the City at the rate of $45.00 per hydrant. The City paid at the rate of $18.00 per hydrant and the petitioner accepted the payment under protest. (R. 32) Demands for full payment and intermittent negotiations as to rates continued until October 22, 1929, on which date petitioner brought suit to recover the balance due for the years 1919 to 1928, inclusive. (R. 33) On December 21, 1933, the City offered to allow judgment to be entered for the sum of $638,185.58, being the amount claimed by the petitioner ($527,355 plus interest of $110,830.58) for the years 1923 to 1928, inclusive, recovery for earlier years having been barred by the statute of limitations. Petitioner accepted the offer and judgment was entered on December 22, 1933. By a later agreement interest was reduced to $47,645. On July 25, 1934, the judgment was satisfied by the payment of $575,000, being $527,355 plus interest of $47,645. (R. 33)

During the period involved Section 472 of the Greater New York Charter required the petitioner, in the absence of a contract, to supply the City with water at rates which were just and reasonable and provided that "in case of a controversy the question of what is just and reasonable shall be determined as a judicial question on its merits by a court of competent jurisdiction."

The petitioner kept its books and filed its tax returns on the accrual basis and after 1931 kept its accounts on

the basis of a fiscal year ending on June 30th. (R. 33) After it began to charge the City at the higher rate, its hydrant rental records were kept in two columns, one recording the charge of $18.00 a year and the other the charge of $45.00 a year. Its journal entries were made on the basis of the $18.00 rate. (R. 32) In its tax returns for the years 1923 to 1928, inclusive, it included as income only the amount collected from the City. (R. 33-34) The cost of the service rendered was claimed as a deduction for the year in which the service was rendered. (R. 33)

The respondent determined that the $575,000 was income, not in the years in which it was earned, not in the year in which it was paid, but in the year in which the judgment was entered. The petitioner appealed to the Board of Tax Appeals, contending that the money was income for the years in which earned. The respondent in his answer (R. 21-25) pleaded estoppel. The petitioner in its reply (R. 25-27) alleged that, even if the amount paid by the City was included in its income for the years in which earned, a true and correct computation of its tax for such years would show little if any tax due. At the trial before the Board, the respondent withdrew the defense of estoppel. The Board sustained the respondent. (R. 44) The petitioner appealed to the Circuit Court of Appeals, contending that the money was income for the years in which earned or, in the alternative, in the year of payment. The Circuit Court sustained the Board of Tax Appeals.

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered on the 18th day of February, 1942. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925 (43 Stat. 938, 28 U. S. C. §347(a)).

Reasons for Granting the Writ.

1. The decision of the Circuit Court of Appeals is in conflict with the decisions of this Court and of other Circuit Courts of Appeals.

In the Federal Control Cases, *Continental Tie & Lumber Company* v. *United States*, 286 U. S. 290; *Commissioner* v. *Old Dominion S. S. Co.*, 47 Fed. (2d) 148; *Helvering* v. *St. Louis Southwestern Ry. Co.*, 66 Fed. (2d) 633; *New York Central Railroad Co.* v. *Commissioner*, 79 Fed. (2d) 247; *Commissioner* v. *Midland Valley R. Co.*, 57 Fed. (2d) 1042; *Helvering* v. *Gulf M. & N. R. Co.*, 71 Fed. (2d) 953, this Court and the lower courts have uniformly held that where the obligation to pay the reasonable value of services was fixed by law and "where nothing remains to be determined at the close of the year except the amount of just compensation on the basis of past facts and established principles" (*Commissioner* v. *Old Dominion S. S. Co., supra*), the amount ultimately received after the settlement or adjudication of a controversy as to the amount is income for the years in which it was earned. This class of cases has been aptly described as involving the "liquidation of a determined right." Where the cases involve "the determination of a disputed right" they uniformly hold that the amount ultimately received is income in the year of payment.

The court below erroneously concluded that this case involved "the determination of a disputed right," although the right to payment was fixed by law and the only dispute was as to the amount. Such holding apparently was on the theory, since the City had paid the amount which it conceded to be due and the controversy was over only the excess claimed by the petitioner, that the case involved the "determination of a disputed right" and that there was a "dispute as to any liability." The Court apparently did not note that in each of the Federal Con-

trol cases the transportation company had collected the uncontested amount of its compensation in the year in which the service was rendered. See in particular *Commissioner* v. *Midland Valley R. Co., supra,* and *Baltimore & O. R. Co.* v. *Commissioner,* 78 Fed. (2d) 456. The decision of the court below is thus clearly in conflict with the decisions of this Court and the lower courts.

2. The Circuit Court of Appeals has decided an important question of federal law which should be settled by this Court. The question of when income is accrued for purposes of inclusion in the gross income of taxpayers keeping their books and making their returns on the accrual basis is particularly pressing in this war period, when the national exigencies require the use of private facilities for Government purposes and the inclusion in war contracts of special and unusual provisions, which are likely to postpone the exact ascertainment of income to a time long subsequent to the year in which the income was earned and in which the facts existed which provide the basis for its final determination. A similar situation in the last war resulted in the Federal Control Cases, the principles of which evidently need clarification and application to the progress of the law in the last twenty years. Otherwise uncertainty and confusion will attend the interpretation for income tax purposes of current provisions for the war emergency. *Cf. John M. Enright Estate* v. *Helvering,* 312 U. S. 636.

3. The decision of the Circuit Court of Appeals is erroneous in that

(a) The money received was income for the years in which earned.

The facts of this case bring it squarely within the rule of the Federal Control Cases, *supra.*

(b) In the alternative, the money received was income in the year of collection.

The respondent has disregarded the applicable portion of Article 331 of Regulations 77 (Revenue Act of 1932), the material part of which reads as follows: "If a person sues in one year on a pecuniary claim or for property, and the money or property is recovered on a judgment therefor in a later year, income is realized in that year, assuming that the money or property would have been income in the earlier year if then received." Here the money was not "recovered" in the year for which the respondent proposes to include it in gross income.

(c) The imposition of the tax is unjust and inequitable.

The respondent withdrew his plea of estoppel after the petitioner pleaded that it had paid substantially all tax due even if the money was included in income for the year in which earned.

WHEREFORE, it is respectfully submitted that the petition should be granted.

HUGH SATTERLEE,
WM. R. GREEN, JR.,
Counsel for Petitioner

Dated, April 28, 1942.